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So It Will be Found That the Right of Women in Many Cases is of Diminished Condition: Rights and the Legal Equality of Men and Women in Twelfth and Thirteenth-Century Canon Law

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"SO IT WILL BE FOUND THAT THE RIGHT OF WOMEN IN MANY CASES IS OF DIMINISHED CONDITION": RIGHTS AND THE LEGAL EQUALITY OF MEN AND WOMEN IN TWELFTH AND THIRTEENTH-CENTURY CANON LAW

*Charles J. Reid, Jr.**

I. INTRODUCTION

In 1792 Mary Wollstonecraft used the expression "rights of women" as a means of criticizing the men who led the French Revolution for failing to advance the cause of women's equality.[1] Finding fault with the French Declaration of the Rights of Man and Citizen for its exclusion of women from an active voice in the governance of the state, Wollstonecraft used the category of rights to argue for the political equality of the sexes: "Consider . . . whether, when men contend for their freedom, and to be allowed to judge for themselves respecting their own happiness, it be not inconsistent and unjust to subjugate women."[2] Women, as much as men, Wollstonecraft argued, should be educated in the civic virtues and

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1. *See* JANET TODD, MARY WOLLSTONECRAFT: A REVOLUTIONARY LIFE 176-87 (2000); MARY WOLLSTONECRAFT, VINDICATION OF THE RIGHTS OF WOMEN 7-11 (Everyman's Library 1992) (1792).

2. WOLLSTONECRAFT, *supra* note 1, at 9.

allowed an equal say in the governance of the realm.[3] Anything less opened one up to "the charge of injustice and inconsistency."[4]

The term "rights of women," and its use as an analytical tool, would seem to be a distinctively modern creation, born of the upheavals of the French Revolution and the loosening of the bonds of traditional society. On the contrary, as this Article will demonstrate, the term "right of women" (*ius mulierum*) was already a term identifiable in the work of a leading thirteenth-century canon lawyer, Cardinal Hostiensis (c. 1200-1271).[5] The idea of rights pertaining to both sexes, indeed, had already become, by the mid-thirteenth century, an important means of analyzing the law governing the marital relationship.

To say this does not make the canonists protoliberals. In most respects, they believed in a strong hierarchical order, in which women were to be subordinated to men.[6] But the canonists, it is now well-established, also made consistent use of a rights-vocabulary and were capable, when circumstances so warranted, of applying that vocabulary to the legal status of women. At times, their analysis recognized a legal equality between the sexes. More often, it did not. But it is the interaction of a hierarchical world view, on the one hand, with notions of rights and equality, on the other, that is the subject of this study. The purpose of this Article is neither to laud nor condemn the canonists, but rather to attempt to understand their treatment of the *ius mulierum* (right of women) and to assess its historical place in the development of the Western rights tradition.

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3. *See* Maria J. Falco, *Introduction: Who Was Mary Wollstonecraft?*, *in* FEMINIST INTERPRETATIONS OF MARY WOLLSTONECRAFT 1, 3 (Maria J. Falco ed., 1996) ("Wollstonecraft maintained that women should be educated to support themselves, with or without marriage, and that they should have the right to pursue the same professions as men—medicine, business, law—and even that they should be represented in Parliament.").

4. WOLLSTONECRAFT, *supra* note 1, at 9.

5. *See infra* note 29 and accompanying text.

6. *See* Eleanor Commo McLaughlin, *Equality of Souls, Inequality of Sexes: Woman in Medieval Theology*, *in* RELIGION AND SEXISM: IMAGES OF WOMAN IN THE JEWISH AND CHRISTIAN TRADITIONS 213 (Rosemary Radford Reuther ed., 1974). *See generally* KARI ELISABETH BORRESEN, SUBORDINATION AND EQUIVALENCE: THE NATURE AND ROLE OF WOMEN IN AUGUSTINE AND THOMAS AQUINAS (Charles H. Talbot trans., Univ. Press of Am. 1981) (1968) (discussing areas of inequality and equality of the sexes in the works of Augustine and Thomas Acquinas).

The canon law of the twelfth and thirteenth centuries was a highly refined system of jurisprudence and the cornerstone of the Western legal tradition.[7] Shaped and forged in the papal revolution of the twelfth century,[8] the canon law of the period from 1140 to roughly 1375 has come to be known as the law's "classic age."[9] In Western Europe where the church assumed broad jurisdictional responsibilities over such matters as marriage and the family,[10] wills and estates,[11] warfare among princes,[12] the enforcement of contracts,[13] and many other matters which one might now think of as purely secular matters, canon law assumed an urgent vitality. Its practitioners were "princes of the law" and formed a transnational

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7. *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983) (providing a comprehensive analysis of canon law during the twelfth and thirteenth centuries).

8. *See id.* at 85-119.

9. *See* JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 44-69 (David Bates ed., 1995); R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW xiii (Alan Watson ed., 1996).

10. *See* R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND (D.E.C. Yale ed., 1974); JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 30-32 (Don S. Browning & Ian S. Evison eds., 1997).

11. *See generally* BRIAN EDWIN FERME, CANON LAW IN MEDIEVAL ENGLAND: A STUDY OF WILLIAM LYNWOOD'S *PROVINCIALE* WITH PARTICULAR REFERENCE TO TESTAMENTARY LAW (1996) (providing a careful study of testamentary law in late medieval England); JEROME DANIEL HANNAN, THE CANON LAW OF WILLS: AN HISTORICAL SYNOPSIS AND COMMENTARY (1934) (providing a conspectus of the historical evolution of wills and testaments in canon law); MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY (1963) (offering an analysis of the development of wills to the end of high Middle Ages).

12. *See* GEORGE MINOIS, L'ÉGLISE ET LA GUERRE: DE LA BIBLE À L'ÈRE ATOMIQUE [THE CHURCH AND WAR: FROM THE BIBLE TO THE ATOMIC AGE] 131-207 (1994); FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 86-212 (Walter Ullmann ed., 2d prtg. 1977); James A. Brundage, *The Limits of the War-Making Power: The Contribution of the Medieval Canonists*, *in* PEACE IN A NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE 69, 69-85 (Charles J. Reid, Jr. ed., 1986).

13. *See generally* JULES ROUSSIER, LE FONDEMENT DE L'OBLIGATION CONTRACTUELLE DANS LE DROIT CLASSIQUE DE L'ÉGLISE [THE FOUNDATION OF CONTRACTUAL OBLIGATION IN THE CLASSIC LAW OF THE CHURCH] (1933) (exploring the foundations of canonistic contract doctrine and its application in the courts of canon law).

elite who shared a common language, a common set of legal principles, and a common outlook.[14]

The classic age can roughly be divided into two periods. The first stretches from 1140 to 1215 and can be called the "age of the decretists." This period commenced with the appearance of a compendious work on canon law edited by a mysterious figure known as Gratian.[15] Known originally as the *Concordia discordantium canonum* (Harmony of discordant canons), the work came quickly to be known by its abbreviated title "*Decretum*," or "decree."[16] This work synthesized and harmonized one thousand years of sometimes conflicting papal pronouncements, conciliar decrees, and teachings of leading church fathers, such as St. Augustine, St. Jerome, and Isidore of Seville.[17] In its depth and thoroughness it was totally original in the history of the church.

The decretists, then, were commentators on Gratian's *Decretum*. In their work, they sought both to resolve questions left implicit in Gratian's analysis and to fill in gaps left open in Gratian's text.[18] Many decretists made profoundly important contributions to the development of Western law, though they are barely known today outside of specialist circles. For instance, Rufinus, who wrote around the year 1160, made important contributions to the development of the Western rights vocabulary.[19] Also, another

14. *See* James A. Brundage, *The Rise of Professional Canonists and the Development of the Ius Commune*, 112 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (*Kan. Abt.*) 26, 54-55 (1995); James A. Brundage, *The Rise of the Professional Jurist in the Thirteenth Century*, 20 SYRACUSE J. INT'L L. & COM. 185, 188 (1994).

15. *See* ANDERS WINROTH, THE MAKING OF GRATIAN'S *DECRETUM* 5-18 (D.E. Luscombe et al. eds., 2000) (discussing the composition of Gratian's *Decretum*); John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 TRADITIO 145, 158-61 (1979) (reviewing the available evidence on Gratian's life).

16. *See* STEPHAN G. KUTTNER, HARMONY FROM DISSONANCE: AN INTERPRETATION OF MEDIEVAL CANON LAW 10 (1960).

17. *See* Stephan Kuttner, *The Father of the Science of Canon Law*, 1 JURIST 2, 4-5, 15 (1941); *see also* John T. Noonan, Jr., *Catholic Law School—A.D. 1150*, 47 CATH. U. L. REV. 1189 (1998) (analyzing Gratian's dialectical method and its influence on Catholic law schools).

18. *See* Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37, 43 (1991).

19. *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625, at 62-63

leading decretist, Huguccio, who was active in the 1180s, made indispensable contributions to the development of Western constitutional structures.[20] Johannes Teutonicus, the last great writer of this movement and the author of the *Ordinary Gloss*—the standard commentary which was copied together with the text itself—flourished in the years 1210 and 1218.[21]

The second period runs from 1215 to 1370 and can be termed the "period of the decretalists." Decretalists were so-called because of their role as commentators on the new flood of papal decretal letters in the twelfth and thirteenth centuries. These decretal letters, often quite detailed in their prescriptions, resembled judicial pronouncements in that they usually responded to cases or controversies, but also resembled legislation in the way in which they laid down rules to govern future conduct.[22] These decretals were gradually put into collections, informally at first, and then in officially promulgated documents.[23] The most important of these collections in the thirteenth century was that known as *Liber extra*, edited by the Spanish Dominican Raymond of Peñafort, and promulgated by Pope Gregory IX in 1234.[24]

These decretal collections, and especially *Liber extra*, developed their own band of commentators in the course of the thirteenth century. Three in particular stand out: (1) Henry of Susa, who as cardinal-bishop came to be known as Hostiensis, flourished from the 1240s to 1271, and wrote both a *Summa* organizing and explicating the law, and a *Lectura* commenting on the individual decretals of *Liber extra*;[25] (2) Sinibaldo dei Fieschi, who reigned as Pope

(John Witte, Jr. ed., 1997).

20. *See* WOLFGANG P. MÜLLER, HUGUCCIO: THE LIFE, WORKS, AND THOUGHT OF A TWELFTH-CENTURY JURIST 136-51 (Kenneth Pennington et al. eds., 1994).

21. *See* BRUNDAGE, *supra* note 9, at 219-20.

22. *See* Charles Donahue, Jr., *Roman Canon Law in the Medieval English Church:* Stubbs vs. Maitland *Re-examined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 680-99 (1974) (discussing the similarities of papal decretals to both case law and legislation); *see also* Reid, *supra* note 18, at 43-44 (discussing further the similarities of papal decretals to legislation and judicial decisions).

23. *See* HELMHOLZ, *supra* note 9, at 10-12.

24. *See id.* at 12-14.

25. *See* BRUNDAGE, *supra* note 9, at 214 (providing biographical details of Hostiensis's *Lectura* on the *Liber extra*).

Innocent IV from 1243 to 1254 and authored a commentary on *Liber extra* in his spare moments as pope, and has been called by F.W. Maitland "the greatest lawyer that ever sat upon the chair of St. Peter;"[26] and (3) Bernard of Parma (d. 1266), who taught for most of his career at the University of Bologna, where he authored the ordinary gloss on the *Liber extra*.[27]

This article will focus primarily on the treatment these three leading canonists and a few others accorded the idea of the right of women (*ius mulierum*). For the most part, the canonists insisted that women occupied an inferior status. They suffered from a number of legal disabilities and lacked many of the rights and powers that belonged to men.[28] But the canonists recognized an equality of rights in three areas: women, like men, were free to choose the place of their burial; women, like men, were free to contract marriage with the partner of their choice; and finally, women were equally free, within marriage, to demand satisfaction of the conjugal debt.

II. THE RIGHT OF CHRISTIAN BURIAL

"So it will be found that the right of women in many cases is of diminished condition."[29] When Hostiensis wrote this passage, he may well have had in mind a passage of Azo, a teacher of Roman law at the beginning of the thirteenth century. Azo wrote that "men and women differ in many respects, because the legal condition of women is less than men."[30] Azo proceeded to list a variety of ways in which women were of diminished capacity: they might not exercise jurisdiction, judgment, guardianship, or a variety of other rights or powers.[31] Furthermore, Azo was not original in making his

26. FREDERIC W. MAITLAND, *Moral Personality and Legal Personality*, *in* 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND, DOWNING PROFESSOR OF THE LAWS OF ENGLAND 304, 310 (H.A.L. Fisher ed., 1911); *see* BRUNDAGE, *supra* note 9, at 225-26.

27. *See* BRUNDAGE, *supra* note 9, at 210 (providing biographical details).

28. *See* Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1151-59 (1990).

29. HOSTIENSIS, LECTURA X 3.26.18 v. *masculis* ("Sic erit deterioris conditionis ius mulierum quod et in multis casibus est reperire.").

30. *See* SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO 60 (Frederic William Maitland ed., 1895) ("et differunt feminae a 'masculis in multis, quia feminarum est condicio deterior 'quam masculorum'. . . .").

31. *See id.*

observation about the status of women. His acknowledged source was the classical Roman jurist Papinian, who wrote that "in many articles of our law the condition of women is inferior to that of men."[32]

Hostiensis, however, moved significantly beyond his sources. Where Azo and Papinian spoke in objective terms, referring simply to the juridic condition of women, or the law pertaining to women, Hostiensis spoke in terms of subjective rights—the *ius mulierum*, best translated as "the right of women."

An older school of thought has maintained that the canonists of this time did not possess a concept of rights, although this view has now been effectively refuted.[33] But even if one accepts that the canonists did make use of a rights-based vocabulary, it is still jarring to encounter a term like *ius mulierum*. The term was, nevertheless, a tool that a creative canonist like Hostiensis was ready to deploy in order to analyze areas of both legal equality and inequality.[34]

There were, as noted, three large areas where the canon law of the thirteenth century recognized legal equality between men and women. Burial, the first of the three areas to be considered, was not viewed in the middle ages as merely the disposal of dead bodies no longer part of the community.[35] Death and the disposition of the dead formed an integral part of communal existence that was closely connected to the central Christian belief in the resurrection of the dead and the transcendence of death itself at the time of the last judgment.[36]

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32. DIG. 1.5.9 (Papinian, Quaestionum 31) ("In multis iuris nostri articulis deterior est condicio feminarum quam masculorum.").

33. *See* TIERNEY, *supra* note 19, at 13-42; Reid, *supra* note 18, at 46-59.

34. Indeed, at the point where Hostiensis observed that the *ius mulierum* was frequently inferior to that of men, he wished to note that in at least one respect—the age at which young men and women could be released by the emperor to administer the estates of their fathers or grandfathers—women were at an advantage with respect to men. Their *ius* was *melioris* (better) because they could petition for such a release at eighteen, while men had to wait to age twenty. *See* CODE JUST. 2.44.2 (Constantine, 321) (the text upon which Hostiensis was commenting).

35. *See generally* Bruce Gordon & Peter Marshall, *Introduction: Placing the Dead in Late Medieval and Early Modern Europe, in* THE PLACE OF THE DEAD: DEATH AND REMEMBRANCE IN LATE MEDIEVAL AND EARLY MODERN EUROPE 1, 1-9 (Bruce Gordon & Peter Marshall eds., 2000) (introducing a collection of essays exploring the role of the dead in medieval Europe).

36. *See* PATRICK J. GEARY, LIVING WITH THE DEAD IN THE MIDDLE AGES

The centrality of the Christian belief in resurrection was a new development in the Greco-Roman world of the first century C.E. Much of the pagan environment in which Christianity took root around the Mediterranean basin rejected the idea of an afterlife.[37] For example, pagan tomb inscriptions often ironically celebrated the eternal non existence of their occupants.[38] Pliny the Elder, the first-century encyclopedist, declared that "[a]ll men are in the same state from their last day onward as they were before their first day, and neither body nor mind possesses any sensation after death, any more than it did before birth . . . ."[39]

Similarly, Jewish theology of the fifth and sixth centuries B.C.E. lacked a well-formed conception of an afterlife. The Old Testament word for the world of the spirits is *sheol*, and it connotes darkness, chaos, and desolation.[40] The dead do not cease to exist, but are forsaken, abandoned, and cut off from God's care.[41] However, a few biblical texts promise a more hopeful future. *Isaiah* speaks of the corpses of the righteous dead who shall arise and sing,[42] and *Ezekiel* prophesies that "I will open your graves and have you rise from them, and bring you back to the land of Israel."[43] The *Book of Daniel* promises that "[m]any of those who sleep in the dust of the earth shall awake . . . ."[44]

Christianity, however, with its belief in a savior who rose from the dead following his execution by Roman authority, made belief in

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1-3 (1994); Natalie Zemon Davis, *Some Tasks and Themes in the Study of Popular Religion*, *in* THE PURSUIT OF HOLINESS IN LATE MEDIEVAL AND RENAISSANCE RELIGION 307, 326-28 (Charles Trinkaus & Heiko A. Oberman eds., 1974).

37. *See* ALFRED C. RUSH, DEATH AND BURIAL IN CHRISTIAN ANTIQUITY 7 (Johannes Quasten ed., 1941) ("Death, for the pagan, often signified the final and irremediable episode of life beyond which nothing was known and nothing was to be looked for.").

38. One inscription reads: "I was not, I am. I shall not be. It causes me no pain." ["Non fui et so non ero non mihi dolet."]. *Id.* at 10 & n.54. Another declares: "Here I am, and I am not." ["Hic so et non so."]. *Id.* at 10 & n.55.

39. PLINY, NATURAL HISTORY Lib. 7, 55.188 (H. Rackham trans., 1938).

40. *See* NICHOLAS J. TROMP, PRIMITIVE CONCEPTIONS OF DEATH AND THE NETHER WORLD IN THE OLD TESTAMENT 21-23 (1969).

41. *See Psalms* 87:4-5.

42. *See Isaiah* 26:19.

43. *Ezekiel* 37:12 (Saint Joseph New Catholic Edition).

44. *Daniel* 12:2 (Saint Joseph New Catholic Edition).

the resurrection of the dead a central part of its teaching.[45] Jesus' miraculous powers included the power to raise the dead,[46] and his closest followers, Peter and Paul, shared in this power.[47] A powerful commitment to the idea of the resurrection of the body permeated early Christian texts and shaped the way burial itself was conceptualized.[48] Gradually, Jewish and Roman burial practices came to be "Christianized" and a powerful new set of beliefs and practices concerning the proper disposition of the dead arose.[49] By the third century one sees the Greek word *koimeterion* (sleeping place or dormitory)[50] used to describe the resting place of Christians. Transliterated into Latin as *coemeterium*, this term has become the modern "cemetery."[51] Christian cemeteries were seen as a place of sleep for the dead until the Second Coming and became the site of important liturgical events, such as celebrations of the Eucharist.[52]

Early Christian theologians emphasized the role of the resurrection in their discussion of the proper care to be shown for the dead. Thus, Prudentius wrote that Christian funerals were elaborate affairs because the bodies laid to rest contained immortal souls and

45. *See* C.F. EVANS, RESURRECTION AND THE NEW TESTAMENT 1-3 (1970).

46. *See John* 4:46-54 (Jesus cures the son of a royal official); *Id.* at 11:1-44 (Jesus raises Lazarus from the dead); *Matthew* 27:51-53 (tombs open upon Jesus' death and the bodies of the saints who had fallen asleep enter Jerusalem). Jesus raises Jairus' daughter from the dead. *See Matthew* 9:18-26; *Mark* 5:21-43; *Luke* 8:40-56.

47. *See Acts* 9:36-42 (Peter raises Tabitha from the dead); *Id.* at 20:7-12 (Paul raises Eutychus from the dead).

48. *See generally* JOANNE E. MCWILLIAM DEWART, DEATH AND RESURRECTION (Thomas Halton ed., 1986) (exploring early Christian writing on the dead and the life of the world to come).

49. *See* FREDERICK S. PAXTON, CHRISTIANIZING DEATH: THE CREATION OF A RITUAL PROCESS IN EARLY MEDIEVAL EUROPE 19-27 (1990).

50. *See* HENRY GEORGE LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 968 (9th ed. 1958).

51. *See* 3 DICTIONNAIRE D'ARCHÉOLOGIE CHRÉTIENNE ET DE LITURGIE 1625 (Fernand Cabrol & Henri Leclercq eds., 1948); A DICTIONARY OF CHRISTIAN ANTIQUITIES 329 (William Smith & Samuel Cheetham eds., Kraus Reprint Co. 1968) (1880).

52. Thus the *Didascalia Apostolorum*, a third century legal text associated with the City of Antioch, exhorted believers to celebrate the Eucharist "both in your congregations and in your cemeteries . . . ." DIDASCALIA APOSTOLORUM: THE SYRIAC VERSION TRANSLATED AND ACCOMPANIED BY THE VERONA LATIN FRAGMENTS 252 (Oxford University Press 1929).

will rise again on the last day.[53] Similarly, St. Augustine stressed that while funerals did not benefit the dead, whom God would raise up again regardless whether they were buried, they were opportunities for the living to show respect for the deceased and to fulfill their natural duties in this world.[54]

From an early date, Christian burial places were integrated into the devotional practices of the larger Christian community. The practice of burial *ad sanctos* (burial within the church at the side of the saints) grew up in the fifth and sixth centuries as a means of seeking the intervention of the anointed of God at the time of judgment.[55] Those who could not be buried at the side of the saints—that is, the great bulk of the Christian community—came to be buried in the yard surrounding the parish church. By the eleventh century "[t]he church and its cemetery are regarded as a unity in Christian practice."[56]

During these early centuries of church history, in a development parallel to the growth of Christian burial practice, there developed a theology of Christian marriage that emphasized the enduring unity of the couple.[57] Male and female were made one flesh at the time of coupling,[58] and neither party was thereafter free to shatter this unity.[59] The unity was not perfect. It did not endure into the next life. In the next life, they neither marry nor are given in marriage.[60] Thus, a widowed spouse might be free to remarry, although the more

53. *See* 1 PRUDENTIUS 87-89 (H.J. Thomson trans., Harvard Univ. Press 1962) (1949).

54. *See* YVETTE DUVAL, AUPRÈS DES SAINTS CORPS ET ÂME: L'INHUMATION 'AD SANCTOS' DANS LA CHRÉTIENTÉ D'ORIENT ET D'OCCIDENT DU IIIE AU VIIE SIÈCLE [AT THE SIDE OF THE SAINTS, BODY AND SOUL: BURIAL 'AD SANCTOS' IN THE CHRISTIAN EAST AND WEST FROM THE THIRD TO THE SEVENTH CENTURIES] 3-11 (1988).

55. *See* Donald Bullough, *Burial, Community and Belief in the Early Medieval West*, *in* IDEAL AND REALITY IN FRANKISH AND ANGLO-SAXON SOCIETY 177, 179 (Patrick Wormald et al. eds., 1983).

56. Lawrence Butler, *The Churchyard in Eastern England, AD 900-1100: Some Lines of Development*, *in* ANGLO-SAXON CEMETERIES 383, 383 (Philip Rahtz et al. eds., 1980).

57. *See* WITTE, *supra* note 10, at 19-22.

58. *See Matthew* 19:5-6.

59. *See* PHILIP LYNDON REYNOLDS, MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS 335-37 (J. Den Boeft et al. eds., 1994).

60. *See Luke* 20:34-36 (Saint Joseph New Catholic Edition).

praiseworthy course of action might be a life of consecrated chastity or some other form of spiritual pursuit.[61] But for terrestrially bound couples, it was not possible for a legally married spouse to escape the bond of marriage.[62]

The law as found at the dawn of the second millenium, invoking the essential oneness of married couples, asserted the obligation of the woman to follow her husband in choice of burial place. Burchard, bishop of Worms in the first quarter of the eleventh century and compiler of an encyclopedic collection of canons representing the practice of the early medieval church,[63] included four texts admonishing wives to be buried in the same tombs as their husbands.[64] A passage of St. Jerome noted that the three great patriarchs—Abraham, Isaac, and Jacob—were all buried with their wives, as was Adam with Eve.[65] In the excerpt reproduced by Burchard, Jerome next turned to the *Book of Tobias* for support, noting that Tobias counseled his son to bury his wife next to him, since they had spent their lives together.[66] A second excerpt from Jerome asserted that "those who were joined together in life should be joined together in a single tomb, because they have become one flesh and what God has joined together, man should not separate."[67]

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61. *See* MICHEL PARISSE, *Des veuves au monastère*, *in* VEUVES ET VEUVAGE: DANS LE HAUT MOYEN AGE [WIDOWS AND WIDOWHOOD IN THE HIGH MIDDLE AGES] 255, 255-74 (1993); JOCELYN WOGAN-BROWNE, SAINTS' LIVES AND WOMEN'S LITERARY CULTURE, C.1150-1300: VIRGINITY AND ITS AUTHORIZATIONS 46-48 (2001).

62. *See* REYNOLDS, *supra* note 59, at 177-78 (reciting the doctrine that adultery is the only valid grounds for divorce).

63. *See* BRIAN EDWIN FERME, INTRODUZIONE ALLA STORIA DELLE FONTI DEL DIRITTO CANONICO [INTRODUCTION TO THE HISTORY OF THE SOURCES OF CANON LAW] 157 (1998); LOTTE KÉRY, CANONICAL COLLECTIONS OF THE EARLY MIDDLE AGES (CA. 400-1140): A BIBLIOGRAPHICAL GUIDE TO THE MANUSCRIPTS AND LITERATURE 133-55 (Wilfried Hartmann & Kenneth Pennington eds., 1999).

64. *See* BURCHARD VON WORMS, DECRETORUM LIBRI XX Lib. 3, cc.160-63 [hereinafter BURCHARD].

65. *See id.* at c.160 (relying upon St. Jerome, *Liber de situ et nominibus: locorum hebraicorum*, 23 PATROLOGIA LATINA 904, 906 (1883)).

66. *See id.*; *Tobias* 4:5. St. Jerome's discussion of the *Book of Tobias* is no longer preserved in the corpus of his work, although medieval legal texts cite to it and discuss it. *See* 1 CORPUS IURIS CANONICI 721 n.23 (Aemilius Friedberg ed., 1955) (1879).

67. BURCHARD, *supra* note 64, at c.161 ("Quos coniunxit unum coniugium, coniungat unum sepulchrum. Quia una caro est, et quod Deus coniunxit, homo

These passages were followed by an excerpt from St. Augustine noting that "a woman should follow her husband, whether in life or in death."[68] Rounding out the four excerpts was a passage from Gregory the Great noting that St. Benedict and his sister, St. Scholastica, who had chosen to follow the monastic vocation like her brother, should become one and the same flesh in a single tomb since they had been of one mind in the Lord.[69] In his rubric, Burchard generalized: "Those who are of one mind, burial should not separate."[70]

As evidenced by hagiography, Burchard of Worms's teaching represented the social ideal toward which persons were expected to strive in the early Middle Ages. The story of St. Ida of Herzfeld, a ninth-century holy woman, provides an example of the sort of devotion expected of wives who survived their husbands.[71] St. Ida was a young noble woman who fell in love with Count Egbert, whom she married after nursing him back to health.[72] Following Egbert's death, Ida built a chapel in his memory and dedicated

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non separet."). This passage no longer appears to be extant in Jerome's work, but is preserved by the legal tradition. *See* 1 CORPUS IURIS CANONICI, *supra* note 66, at 721 n.23.

68. BURCHARD, *supra* note 64, at c.162 ("Unaquaeque mulier sequatur virum suum, sive in vita, sive in morte.").

69. *See id.* at c.163. "Soror sancti Benedicti sepulta est in sepulchro quod ipse sibi praeparaverat, ut quorum mens una semper fuit in domino, eorum quoque corpora sepultura non separaret. Ita in primo connubio coniuncti, quia una et eadem caro est, in uno sepulchro sepeliantur." [The sister of St. Benedict was buried in the tomb he had prepared for himself, so that their minds, always one in the Lord, as well as their bodies, the grave should not separate. So those joined in a first marriage, because they are one and the same flesh, should be buried in one tomb] I GREGORY THE GREAT, DIALOGUES Lib. 1, c.34 (1978); *see also* T.F. LINDSAY, SAINT BENEDICT: HIS LIFE AND WORK 173-85 (1949) (discussing the relationship of St. Benedict and St. Scholastica); JUSTIN MCCANN, SAINT BENEDICT 43-45, 210-12 (1979) (providing further details concerning the relationship of Gregory and St. Scholastica).

70. BURCHARD, *supra* note 64, at c.163 ("Quorum mens una fuerat, sepultura non separet.").

71. *See* Uffing of Werden, *De sancta Ida vidua*, *in* II ACTA SANCTORUM SEPTEMBRIS, 255, 260-69 (1756); *see also* JEAN LECLERCQ, MONKS ON MARRIAGE: A TWELFTH-CENTURY VIEW 48-50 (1982) (reviewing the life of St. Ida).

72. *See* LECLERCQ, *supra* note 71, at 48-49; Uffing of Werden, *supra* note 71, at 261.

herself to a life of austere sanctity and charity toward the poor.[73] She eventually ordered a marble tomb to be built for both of them,[74] where "[t]heir bodies [would be] united in the grave forever."[75]

That these expectations were well-entrenched at the dawn of the second millenium should perhaps not be surprising. In an enchanted world, where the boundary lines between the living and the dead were not clearly drawn,[76] where a whole spirit world seemed palpable and nearly within reach,[77] the social ideal of husbands and wives remaining side-by-side, awaiting eternity, probably seemed like an altogether natural extension of lived reality.

This understanding of eternal togetherness remained deeply embedded in the law at the beginning of the twelfth century. Ivo of Chartres (ca. 1040-1115) was a pupil of Lanfranc, a classmate of Anselm of Canterbury, and the reform-minded bishop of Chartres from his election in 1090 to his death in 1115.[78] He was also the greatest canon lawyer of his day, compiling three major works on canon law and authoring a text, known as the *Prologue*, which laid down basic rules of legal interpretation that would exercise great influence on subsequent canonistic development.[79] Ivo included in

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73. *See* LECLERCQ, *supra* note 71, at 49-50; Uffing of Werden, *supra* note 71, at 262.

74. *See* Uffing of Werden, *supra* note 71, at 262.

75. LECLERCQ, *supra* note 71, at 50.

76. *See* VALERIE I.J. FLINT, THE RISE OF MAGIC: IN EARLY MEDIEVAL EUROPE 213-16 (1991); STEPHEN WILSON, THE MAGICAL UNIVERSE: EVERYDAY RITUAL AND MAGIC IN PRE-MODERN EUROPE 297-302 (2000).

77. *See, e.g.*, FLINT, *supra* note 76, at 101-08, 146-72; *see also* Peter M. De Wilde, *Between Life and Death: The Journey in the Otherworld*, *in* DEATH AND DYING IN THE MIDDLE AGES 175, 175-82 (Edelgard E. DuBruck & Barbara I. Gusick eds., 1999) (documenting visions and other experiences of the spirit world).

78. *See generally* ROLF SPRANDEL, IVO VON CHARTRES UND SEINE STELLUNG IN DER KIRCHENGESCHICHTE [IVO OF CHARTRES AND HIS PLACE IN CHURCH HISTORY] (1962) (reviewing the life and career of St. Ivo of Chartres); 7 DICTIONARY OF THE MIDDLE AGES 21-22 (Joseph R. Strayer ed., 1986) (providing a brief summary of the life and works of Ivo of Chartres).

79. *See* Ivo of Chartres, *Decretum*, 161 PATROLOGIA LATINA 59, 59-1022 (1889) [hereinafter Ivo, *Decretum*]; Ivo of Chartres, *Panormia*, 161 PATROLOGIA LATINA 1041-344 (1889); Ivo of Chartres, *Collectio Tripartita* (remains unpublished) (which include Ivo's canonistic compilations); *see also* KÉRY, *supra* note 63, at 244-50 (reviewing manuscript and publication history of Ivo of Chartres' work); YVES DE CHARTRES, PROLOGUE (Jean Werckmeister ed. & trans., 1997) (setting forth Ivo's theory of legal

his *Decretum* the same four texts that Burchard employed, making it clear that the teaching on wives following their husbands remained intact.[80]

Gratian, too, made use of these texts.[81] The overarching concern of *Causa* 13, *quaestio* 2, where he inserted these texts, related to the proper ownership of tithes and other fees payable to the church, including those payable upon burial.[82] Gratian opened his analysis by inquiring into the possession of the *ius funerandi*, by which he meant not the right of the individual to choose a place of burial but rather the right of the church to collect its burial fees.[83] Married persons, Gratian stated, following St. Jerome, were obliged to be buried in a single grave.[84] Although Gratian did not explicitly state his conclusion, he apparently intended by this rule that a pastor of a deceased husband would also subsequently bury his widow, thus allowing the parish to collect fees for both funerals.

Gratian, however, also articulated principles in his *Decretum* that stood in seeming contradiction to a hard and fast rule requiring wives to follow their men in the choice of burial places. Immediately after reproducing Gregory the Great's description of St. Benedict's sister seeking burial in Benedict's tomb, Gratian posed the issue of the proper burial place of adult children.[85] Are such children obliged to choose the burial places of their parents? It seemed, Gratian initially replied, that they were.[86] After all, it is recorded that St. Philip built a tomb for himself and his family,[87] and

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interpretation).

80. *Compare* Ivo, *Decretum*, *supra* note 79, at Lib. 3, c.223 *with* BURCHARD, *supra* note 64, at c.160; Ivo, *Decretum*, *supra* note 79, at Lib. 3, c.224 *with* BURCHARD, *supra* note 64, at c.161; Ivo, *Decretum*, *supra* note 79, at Lib. 3, c.225 *with* BURCHARD, *supra* note 64, at c.162; Ivo, *Decretum*, *supra* note 79, at Lib. 3, c.226 *with* BURCHARD, *supra* note 64, at c.163.

81. *Compare* C.13 q.2 c.2 *with* Ivo, *Decretum*, *supra* note 79, at Lib. 3, cc.223-24; C.13 q.2 c.3 *with* Ivo, *Decretum*, *supra* note 79, at Lib. 3, cc.225-26.

82. *See* C.13 q.2 pr.

83. *See* C.13 q.2 d.a.c.2.

84. *See id.* ("Sicut Ieronimus scribit, coniugati in uno sepulcro videntur esse ponendi.").

85. *See* C.13 q.2 d.p.c.3; *see also supra* notes 69-70 and accompanying text (discussing Gregory the Great and St. Scholastica on burial).

86. *See* C.14 q.2 d.p.c.3.

87. *See id.*

Saint Severus, archbishop of Ravenna, built a tomb for himself, his wife, and his daughter.[88]

But not everyone chose to be buried with their parents. Isaac was buried next to Abraham, but Ishmael, Abraham's son by his servant girl, was not.[89] Nor were Adam's children all buried with Adam. Indeed, this would have been impossible, given that the whole multitude of the human race could not be accommodated in such a small burial site.[90] If children were free to make this choice, one might reason, though Gratian did not, why not wives?

Gratian continued his analysis by including a text of Gregory the Great holding that the final wishes (*ultima voluntas* or last will) of the decedent should in all respects (*in modis omnibus*) be respected.[91] He followed this text with one from the Council of Tribur allowing Christians to choose freely to be buried at the episcopal see, or with congregations of canons, monks, nuns, or at the parish where they paid their tithes.[92] Acknowledging the possibility of choice, Gratian returned his analysis to the issue of children electing to be buried apart from their parents: It is one thing when the choice is the result of pride, and quite another when it is made for some reasonable cause.[93] As Gregory the Great put it, the freely chosen last will of the decedent to seek "new hospitality" for his body ought to be respected.[94]

The early decretists had relatively little to say on the subject of women following their husbands in death. The *Summa parisiensis* merely noted that it was Rachel who was buried next to Jacob,[95]

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88. *See id.*
89. *See id.*
90. *See id.*
91. *See* C.13 q.2 c.4.
92. *See* C.13 q.2 c.6.
93. *See* C.13 q.2 d.p.c.7 ("Sed aliud est ex temeritatis superbia, usum antiquorum parentum non sequi, atque aliud rationabili occasione novam sibi sepulturam . . . .").
94. *Id.* ("Secundum Gregorium autem liberam habet ultimam voluntatem qui certae rationis causa novum suo corpori querit hospitium."). Gratian acknowledged that the expression *ultima voluntas* might have a double meaning. While he used the expression to specify one's final determinations regarding burial, "certain others" (*quidam*) used the term to describe the *testamentum*, the property arrangements one makes in contemplation of death. *Id.*
95. *See* THE SUMMA PARISIENSIS ON THE DECRETUM OF GRATIANI C.13 q.2 c.2 v. *Ebron* (Terence P. McLaughlin, C.S.B. ed., 1952).

while Stephen of Tournai called attention to the physical dimensions of the tomb of the patriarchs.[96] Rufinus, in contrast, emphasized the importance of honoring the final will of the decedent, "since there is no greater duty owed to men than" recognizing decisions which can no longer be altered.[97]

It is possible that this reticence was the result of changing social expectations; for it is now understood that the twelfth century was a period of blossoming "individualism."[98] Beginning in the twelfth century, one sees new developments in the social and economic spheres that gave an increasing range of choice to increasing numbers of individuals. In the realms of theology and philosophy one encounters new inquiries that emphasized such concerns as the inward development of the individual soul and its survival following the believer's death,[99] as well as inquiries into questions of personal autonomy and responsibility.[100] Also, it was during the twelfth century that Gratian pioneered the consent theory of marriage, making the exchange of consent of the parties central to the

96. *See* STEPHAN VON DOORNICK, DIE SUMMA ÜBER DAS DECRETUM GRATIANI [STEPHEN OF TOURNAI, SUMMA ON THE *DECRETUM* OF GRATIAN] C.13 q.2 c.2 v. *Ebron* (Johann Friedrich von Schulte ed., 1965).

97. RUFINUS VON BOLOGNA, SUMMA DECRETORUM C.13 q.2. c.4 v. *ultima voluntas* (Heinrich Singer ed., 1963) ("nichil enim est quod hominibus debeatur quam ut supreme voluntatis, postquam aliud velle non possunt . . . .").

98. *See generally* COLIN MORRIS, THE DISCOVERY OF THE INDIVIDUAL 1050-1200 (1972) [hereinafter MORRIS, DISCOVERY] (discussing the development of individualism as an essential attribute of Western Christian society); Caroline Walker Bynum, *Did the Twelfth Century Discover the Individual?* 31 J. ECCLESIASTICAL HIST. 1 (1980) (reviewing and questioning aspects of Morris's argument); Colin Morris, *Individualism in Twelfth-Century Religion: Some Further Reflections*, 31 J. ECCLESIASTICAL HIST. 195 (1980) (responding to Bynum).

99. *See* MORRIS, DISCOVERY, *supra* note 98, at 76-78. *See generally* Odon Lottin, *L'identité de l'âme et de ses facultés pendant la première moitié du XIIIe siècle* [The Identity of the Soul and Its Faculties in the First Half of the Thirteenth Century], 36 REVUE NÉOSCOLASTIQUE DE PHILOSOPHIE 191 (1934) (considering scholastic treatments of the individual soul and its attributes).

100. *See generally* EDOUARD-HENRI WEBER, LA PERSONNE HUMAINE AU XIIIE SIÈCLE: L'AVÉNEMENT CHEZ LES MÂITRES PARISIENS DE L'ACCEPTION MODERNE DE L'HOMME [THE HUMAN PERSON IN THE THIRTEENTH CENTURY: THE PARISIAN MASTERS AND THE ORIGIN OF THE MODERN MEANING OF MAN] (1991) (examining the scholastic foundations of modern conceptions of the human person).

formation of marriage thereby repudiating a tradition that gave wide room to parental arrangements.[101]

That social expectations were, indeed, changing is definitively evidenced by a decretal issued by Pope Lucius III (reigned 1181-1185) declaring that a wife should have a free faculty equal to her husband in choosing her place of burial (*liberam . . . aequalem . . . facultatem*).[102] In a choice such as this, Lucius continued, the woman should be released from her husband's rule (*mulier solvitur a lege viri*).[103] The teaching of Jerome and Augustine that a wife should follow her husband was thereby rejected in favor of the principle of free choice, which Gratian had introduced into his analysis of selection of burial site but failed to apply to wives. Furthermore, by choosing the word *facultas* Pope Lucius III connected this freedom of choice with an emerging rights vocabulary that stressed individual discretion in matters fundamental to one's spiritual development.[104]

Lucius's decretal became the foundation of thirteenth-century canonistic analysis of choice of burial ground. Bernard of Parma began his summary of the decretal by observing that just as the husband is free to choose his place of burial, so also is the wife, and there is no difference between them because the wife is released from her husband's rule.[105] Glossing the word *aequalem*, Bernard raised as an objection Jerome's invocation of *Matthew* 19:6, "what God has joined together, man may not separate," and replied that Jerome's exegesis operated only where the wife has not chosen her place of burial.[106] But where she has chosen to be buried apart from her husband, the holding of Pope Lucius's decretal prevails.[107]

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101. *See* John T. Noonan, Jr., *Power to Choose*, 4 VIATOR 419 (1973); *see also infra* notes 138-41 and accompanying text (considering further Judge Noonan's study of Gratian's consent theory).

102. *See* X 3.28.7.

103. *See id.*

104. *See* Charles J. Reid, Jr., *Thirteenth-Century Canon Law and Rights: The Word* ius *and Its Range of Subjective Meanings*, 30 STUDIA CANONICA 295, 314-19 (1996).

105. *See* BERNARD OF PARMA, ORDINARY GLOSS X 3.28.7 v. *casus* ("Sicut liberum est viro eligere sepulturam, ita liberum est mulieri; nulla est in hoc casu inter eos differentia, cum a lege viri soluta esse intelligatur.").

106. *Id.* at X 3.28.7 v. *aequalem.*

107. *See id.*

Innocent IV, in his *Commentaria*, proposed two possible ways to reconcile Lucius's decretal with the texts of Gratian's *Decretum* without accepting either interpretation.[108] It is possible, Innocent reasoned, to see Gratian's texts as establishing the socially proper course of conduct (*de honestate*) while Lucius's decretal established a kind of legal minimum (*de iure*).[109] But it is also possible, the pope-turned-canonist continued, to accept Bernard's reading of Gratian's texts as applicable only in cases where the wife has not herself chosen a place of burial.[110]

Raymond of Peñafort sided with Bernard. Commencing his analysis, Raymond declared broadly: "I say . . . that any living adult of sound judgment can choose to be buried where he/she wishes . . . ."[111] Raymond went on to make clear that wives, as well as husbands, enjoyed this freedom: "About the wife whose husband has died, I say that she is able to choose to be buried apart from her husband. But if she dies without selecting a place of burial, then I believe she ought to be buried with her husband."[112]

Hostiensis offered perhaps the most complex and thorough defense of Lucius's decretal and in the process displayed his own virtuosic command of Roman law. He began his gloss to *aequalem* by noting that scripture seemed to stand against Pope Lucius. "What God has joined together," Hostiensis observed, quoting the first half of *Matthew* 19:6, expecting his readers to fill in the second half.[113] But, Hostiensis continued, citing to a phrase in Justinian's *Novel* 22, it is death, which looses all things, which separates the couple in the instant case, not man.[114] However, Hostiensis noted that another passage of Roman law seemed to stand against this proposition. He observed that wives are immunized from suits charging the

108. *See* INNOCENT IV, COMMENTARIA X 3.28.7 v. *liberam.*

109. *See id.*

110. *See id.*

111. RAYMOND OF PEÑAFORT, SUMMA DE PAENITENTIA 435 (Xaviero Ochoa & Aloisio Diez eds., 1976) ("[D]ico . . . quod quilibet adultus et discretus vivens potest eligere sepulturam ubicumque . . . .").

112. *Id.* at 436 ("De uxore, dico, cuius maritus defunctus est, quod potest eligere sepulturam, etiam alibi quam in sepulchro viri. Si tamen moriatur, non electa sepultura, credo quod debeat sepeliri cum viro.").

113. HOSTIENSIS, *supra* note 29, at X 3.28.7 v. *aequalem* (quoting *Matthew* 19:6).

114. *See id.*; *see also* NOV. 22.20 (Justianian 535) ("Deinceps autem matrimoniorum terminum quae omne similiter solvit expectat mors.").

plundering of an estate, because they are their husband's helpmate, "both in human affairs and in their heavenly home."[115]

If, then, women share a heavenly residence with their husbands even on the authority of Roman law, how might one preserve Pope Lucius's teaching? Hostiensis turned first to Innocent IV's distinction between conduct that is socially proper (*de honestate*) and that which is legally allowed (*de iure*).[116] Lucius's teaching might be the strict law, but propriety teaches women to follow their husbands in death as well as life. Hostiensis, however, suggested an even better answer (*vel melius dic*).[117] Where a husband has chosen to be buried in his own church, or even in another church, and his wife has not specified a place of burial for herself, she should be seen as following her husband.[118] This much, Hostiensis made clear through a series of cross-references to Roman legal texts, was demanded by the ancient law.[119]

Where, however, a wife has chosen her own place of burial, her choice must be respected (*electioni suae standum esset*), whatever the disposition her husband may have made.[120] This conclusion should be seen simply as a practical elaboration of Gregory the Great's principle that the last will of the decedent must be respected.[121] Hostiensis reiterated the conclusion in his gloss to *facultatem*: A wife is obliged to remain under her husband's authority, but this authority is dissolved with her husband's death.[122] Accordingly, she is free to choose her own place of burial.[123]

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115. HOSTIENSIS, *supra* note 29, at X 3.28.7 v. *aequalem* ("quae socia rei humanae atque divinae domus"); *see also* CODE JUST. 9.32.4 (Gordianus 242) (providing an imperial decree immunizing wives from suits alleging the plundering of their husbands' estates).

116. *See* HOSTIENSIS, *supra* note 29, at X 3.28.7 v. *aequalem*.

117. *See id.*

118. *See id.*

119. *See id.*; CODE JUST. 12.1.13 (Valentinianus, Theodosius, and Arcadius 392) (ordering that women should share the same social status as their husbands); *see also* DIG. 50.1.22.1 (Paulus, Sententiarum 1) (teaching that a widow retains the same domicile as her deceased husband). By analogy, therefore, a wife should follow her husband's choice of burial site.

120. *See* HOSTIENSIS, *supra* note 29, at X 3.28.7 v. *aequalem*.

121. *See id.*

122. *See id.* at v. *facultatem*.

123. *See id.*

Pope Lucius's decree, fortified by the teaching of the thirteenth-century canonists, became the established teaching of the church. Johannes Andreae, writing in the fourteenth century, took the prior commentary for granted when he asserted that "a married woman can freely choose her place of burial."[124] Luis de Molina, the great Portuguese Jesuit, writing at the end of the sixteenth century, reached a similar conclusion.[125] He asserted that every living person is able to select his or her own place of burial, even if it means rejecting the family burial site or selecting a place that is "less holy."[126] Just as a husband is able to select a place of burial, so may a wife, although she is to follow her husband where she has not made an independent choice.[127] A wife, Molina noted, might have good reason to do this: She might be divorced from her husband, she might have married a man of lesser social status, or her husband might have died a long time ago and she might now wish to be buried in her father's family tomb.[128]

The principle of free selection came to be incorporated as well into the great seventeenth-century work on cemetery law written by Peter Murga.[129] Murga simply took for granted the principle that a wife might select her own place of burial, even if her husband was still alive.[130] Just as her husband is free, so also his wife is free to make this choice. Relying on Lucius's decretal, Murga reasoned that there is no difference between male and female in this instance since the wife is understood to be released from her husband's authority upon death.[131]

This basic freedom came to be codified in the 1917 Code of Canon Law, which declared that a wife and children may select their

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124. JOHANNES ANDREAE, COMMENTARIA X 3.28.7 *casus*.

125. *See* LUIS DE MOLINA, DE IUSTITIA ET IURE [ON JUSTICE AND RIGHT] Lib. 1, disp.214, cols.904-08 (1733).

126. *Id.* at col.906. By "less holy," Molina meant places where the sacrifice of the mass and the divine office are said less often. *See id.*

127. *See id.* at col.907.

128. *See id.*

129. *See generally* PETER DE MURGA, DISQUISITIONES MORALES ET CANONICAE (1666) (the leading early modern treatise on cemetery law).

130. *See id.* at 300 ("An mulier, marito vivente, sibi possit Sepulturam eligere?").

131. *See id.* ("Sicut liberum est viro eligere Sepulturam, ita liberum est mulieri. Nulla est differentia inter eos in hoc casu, cum a lege viri soluta esse intelligatur.").

places of burial immune of paternal power.[132] The 1983 Code of Canon Law, for its part, announced that everyone, unless forbidden by law, shall be allowed to choose his or her own place of burial.[133] Today, this rule seems like a self-evident proposition, but the law might have taken a very different course had it not been for the efforts of Pope Lucius III and the thirteenth-century decretalists to establish parity between men and women on the subject of Christian burial.

III. THE RIGHT TO CHOOSE A MARRIAGE PARTNER

It is assumed today that marriage is based on the freely exchanged consent of the parties. But this assumption, like the freedom to select one's place of burial, originated in the matrix of twelfth century legal writing, particularly that of Gratian. Roman law followed very different rules on the subject of marital formation. Marriage under Roman law was, to be sure, agreed to by the parties, but "[o]ver and above the consent of the immediate parties, that of their *paterfamilias* (head of household) was indispensable."[134] Among upper-class Romans, for whom Roman domestic relations law was chiefly concerned, the making of a marriage involved complex negotiations implicating business and political considerations and the need to create or cement ties among competing families.[135] In this context, mere passive acceptance by a son was sufficient consent to his father's will.[136] The standard set by Roman law for women was even less demanding: a girl who did not resist her father was presumed to have consented to marriage, an

132. *See* 1917 CODE c.1223, § 2.

133. *See* 1983 CODE c.1180, § 2; *see also* THE CANON LAW LETTER & SPIRIT: A PRACTICAL GUIDE TO THE CODE OF CANON LAW 669-70 (Gerard Sheehy et al. eds., 1995) (elaborating on the principle that individuals should be able to choose their place of burial).

134. PERCY ELLWOOD CORBETT, THE ROMAN LAW OF MARRIAGE 57 (1930).

135. *See* SUSAN TREGGIARI, ROMAN MARRIAGE: *IUSTI CONIUGES* FROM THE TIME OF CICERO TO THE TIME OF ULPIAN 125-60 (1991).

136. The relevant text provided: "Si patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter inuitos non contrahitur: maluisse hoc uidetur." [If at a father's compulsion, one takes a wife, whom one would not have taken if left to one's own judgment, he has nevertheless contracted marriage, which is not contracted among the unwilling, but he appears to have preferred it.] DIG. 23.2.22 (Celsus, Digestorum 15).

excerpt of Ulpian, found in the *Digest*, provided; and, Ulpian went on, she may only resist her father where the prospective husband is unworthy in his morals or "foul."[137]

In an important article, Judge John Noonan, Jr., considered the originality of Gratian's consent theory of marriage.[138] Although Gratian's sources—Roman law, patristic literature, decrees of early popes like Leo the Great—firmly favored a role for parental consent in the marriages of their children, Gratian rejected such a rule.[139] Henceforth, the consent of the parties alone sufficed to make a marriage, and this consent could neither be invalidated nor supplied by parents or by others.[140] Furthermore, in Gratian's mind this consent was of a very special type: "[N]ot any consent, not merely lustful consent to intercourse, not merely intellectual consent to a shared life, but consent informed with that special quality that Gratian, drawing on the Roman law, denominated 'marital affection,' an emotion-colored assent to the other as husband or wife."[141]

While subsequent canonists and theologians would engage in a long and bitter struggle over the relationship of consent as opposed to consummation in marital formation—the compromise eventually achieved made consent central while holding that consummation conferred a special firmness on marriage that made it indissoluble[142]—the free agreement of the parties remained the foundation of the canonistic theory of marriage. Even in the face of the social disruption that was thereby caused by the problem of clandestine marriages (marriages in the absence of an official church witness), the church continued to teach that the parties themselves made a marriage through the exchange of freely given, present-tense consent.[143]

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137. *See* DIG. 23.1.12 (Ulpian, De sponsalibus) ("[S]ed quae patris uoluntati non repugnat, consentire intellegitur. Tunc autem solum dissentiendi a patre licentia filiae conceditur, si indignum moribus vel turpem sponsum ei pater eligat.").

138. *See* Noonan, *supra* note 101.

139. *See id.* at 422-24, 426 (citing Gratian C.32 q.2 d.a.c.6).

140. *See id.* at 433. "[I]n recognizing an area of freedom where parents should not trespass, the canons acknowledged rights of the individual not dependent on family." *Id.*

141. *Id.* at 425.

142. *See* JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 235-42, 260-78 (1987).

143. *See* BRUNDAGE, *supra* note 142, at 361-64, 440-43, 496-501; *see also*

In the process of guaranteeing parties free choice in the matter of marriage partners, the canonists created a zone of legally protected freedom that came to be conceptualized as a right.[144] The canonists developed at least two different legal doctrines to safeguard this right. On the one hand, they made use of an interpretive doctrine called, in shorthand, *prohibitoria edicta* (prohibitory edicts) as a means of invalidating laws that had the effect of restricting the right to marry.[145] The doctrine on prohibitory edicts taught that in the case of certain fundamental rights, legislation prohibiting the exercise of a given right would be strictly construed.[146] Thus, in the case of marriage, "all individuals not expressly forbidden to marry were permitted to marry."[147] The decretalists relied on this doctrine to teach that laws preventing the marriages of deaf-mutes, slaves, and even lepers should be considered invalid.[148] In practice, this doctrine must have closely resembled the operation of the modern strict scrutiny doctrine in its concern for individual choice.[149]

The right to marriage was protected in a second way as well. In order to protect the freedom needed for valid consent, the canonists put into place a structure of law designed to guard against the use of coercion by parents or by third parties.[150] The decretal *Veniens ad nos*, authored by Pope Alexander III, referred to a man, "G," who had fathered a child by a mere girl (*puella*), and subsequently found himself compelled (*coegit*) to marry her.[151] Alexander instructed the

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Noonan, *supra* note 101, at 430 ("The rule [on clandestine marriage] chimed with the rule recognizing the right to reject a parental choice. In combination they put power to marry in the hands of those getting married.").

144. *See* Reid, *supra* note 18, at 73-80; *see also* BRUNDAGE, *supra* note 142, at 431 (documenting the actionability of this right in the ecclesiastical courts).

145. *See* Reid, *supra* note 18, at 78-80.

146. Hostiensis also indicated the right to postulate candidates to office and the right to make a will were also governed by the doctrine on prohibitory edicts. *See* HOSTIENSIS, SUMMA Lib. 1 *De postulando* § 2. In each example, personal freedom trumped most other concerns.

147. Reid, *supra* note 18, at 78.

148. *See id.* at 79-80.

149. *See id.* at 80.

150. *See id.* at 74-80.

151. *See* X 4.1.15; *see also* Charles Donahue Jr., *The Policy of Alexander the Third's Consent Theory of Marriage*, *in* PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 251, 251-53 (Stephan Kuttner ed., 1976) (proposing to examine the policy behind Alexander's decretal).

judge hearing the case to determine the validity of G's consent by reference to whether the force and fear brought to bear against him was sufficient to move a steady man (*constans vir*).[152]

The expression *constans vir* was subsequently adopted by the canonists as the measure to be utilized in assessing impermissible force and fear. Some decretalist commentary connected the sort of fear that would move a steady man with threats of death or grave bodily harm.[153] But nearly from the beginning the popes were willing to contemplate a broader range of factors than mere physical suffering. Thus, Gregory IX, in the decretal *Gemma*, invalidated a betrothal agreement that contained a penalty clause requiring forfeiture of a fixed sum in the event the betrothal was repudiated.[154] "This decretal recognize[d] that fear need not only be the product of physical threats. Financial and other concerns might also give rise to an impermissible fear."[155] The canonists would eventually work the concept of the steady man into "a fictional man of average fortitude who served in fear cases much as a 'prudent man' is used to measure negligence in modern tort law."[156]

In the decretal *Consultationi*, Honorius III explicitly applied the steady man test to women.[157] He declared that women who flee their husbands protesting that they were compelled to give consent by reason of force and fear, even though they inwardly dissented, ought to have their day in court.[158] Where the fear they experienced was sufficient to move a steady man, the pope reasoned, the marriages themselves should be invalidated.[159]

Even though the pope used "male" language in this decretal, holding women to the standard *constans vir*, at least one canonist,

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152. *See* X 4.1.15.

153. *See* HOSTIENSIS, *supra* note 29, at X 4.1.15 v. *in constantem* (citing *Abbas sancti cadmundi* X 1.40.2 (a decretal of Alexander III's ruling against an abbot who threatened a local priest with forcible ejection from his church); *Cum dilectus* X 1.40.6 (a decree of Innocent III equating the sort of fear that would move a steady man with *metum mortis* (threat of death) or *cruciatum corporis* (physical torture))).

154. *See* X 4.1.29.

155. Reid, *supra* note 18, at 76.

156. John T. Noonan, Jr., *The Steady Man: Process and Policy in the Courts of the Roman Curia*, 58 CAL. L. REV. 628, 654 (1970).

157. *See* X 4.1.28.

158. *See id.*

159. *See id.*

Hostiensis, argued that the impact of force and fear on women might be different than on men.[160] Hostiensis premised his analysis on the principle that fear cases must be judged by the totality of circumstances. Threats of violence might invalidate consent, but so might financial threats, such as disinheritance.[161] A good judge, Hostiensis noted, will examine the sort of persons (*qualitate personarum*) alleging force and fear, the type of force or compulsion brought to bear, its time and place, and whether consent was subsequently ratified or whether the party always dissented.[162]

In this context, Hostiensis observed, one factor to bear in mind was whether the party making the allegations was a woman. A woman's consent might be impeded by a lesser fear than a man's.[163] Women are the more fragile sex, Hostiensis noted, employing a stereotype of his day, reasoning that the Latin word for women (*mulier*) is derived from "softness of heart" (*mollice cordis*).[164] In assessing Hostiensis's analysis, one should avoid the easy criticism that he is merely reflecting the kind of misogynistic world view common to many thirteenth-century writers. In fact, Hostiensis seems to be coming to terms with the full range of possibilities in force and fear cases and acknowledging that women—who, in a male-dominated world, may be more vulnerable to economic as well as physical threats—might in the proper circumstances be in greater need of judicial solicitude.

Women in the later Middle Ages were able to avail themselves both of the freedom to contract marriage and the protection afforded by the doctrine on coerced consent. It is doubtlessly true that many, probably most, marriages of the later Middle Ages were the product of at least some kind of parental arrangement.[165] But the whole weight of ecclesiastical authority now favored freedom. The marriage liturgies that developed in the twelfth and thirteenth centuries required the church's minister to inquire into the couple's

160. *See* HOSTIENSIS, *supra* note 146, at Lib. 4 *De matrimoniis* § 27.
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. *See* Shannon McSheffrey, *"I Will Never Have None Ayenst My Faders Will": Consent and the Making of Marriage in the Late Medieval Diocese of London*, *in* WOMEN, MARRIAGE, AND FAMILY IN MEDIEVAL CHRISTENDOM 153, 157-59 (Constance M. Rousseau & Joel T. Rosenthal eds., 1998).

willingness to have one another as man and wife.[166] Handbooks for pastors reminded priests of the importance of the parties' freedom to consent.[167] And it remained true that couples who were willing to flaunt the disapproval of their families were free to marry one another, even in the absence of church authority.

The degree to which such freedom was actually claimed by parties is illustrated by the famous case of Margery Paston from the fifteenth century. The Pastons were among the wealthiest and most influential families of fifteenth-century England, and they left a large record of their doings.[168] At the age of seventeen, Margery clandestinely married Richard Calle, the family bailiff, over the objections of the Paston family.[169] The validity of the marriage was ultimately sustained in a hearing before the Bishop of Norwich.[170] The penalty Margery faced for "not complying with the standards for women of her social class . . . was social ostracism, both as a member of her family and as a member of a specific class of society."[171] Her marriage, however, remained legally valid.

The record indicates that women, as well as men, were also able to avail themselves of the protection of the teaching against coerced consent. The decretal *Gemma*, in which Pope Gregory IX ruled a penalty clause in a betrothal agreement an impermissible infringement on liberty, involved a woman complainant.[172]

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166. *See* MICHAEL M. SHEEHAN, *Choice of Marriage Partner in the Middle Ages: Development and Mode of Application of a Theory of Marriage*, *in* MARRIAGE, FAMILY, AND LAW IN MEDIEVAL EUROPE: COLLECTED STUDIES 87, 113-17 (James K. Farge ed., 1996).

167. *See* Jacqueline Murray, *Individualism and Consensual Marriage: Some Evidence from Medieval England*, *in* WOMEN, MARRIAGE, AND FAMILY IN MEDIEVAL CHRISTENDOM, *supra* note 165, at 121, 128-30.

168. *See generally* H.S. BENNETT, THE PASTONS AND THEIR ENGLAND: STUDIES IN AN AGE OF TRANSITION (2d ed. 1932) (discussing the Paston family as providing insight to daily life of fifteenth century England).

169. *See* FRANCES GIES & JOSEPH GIES, A MEDIEVAL FAMILY: THE PASTONS OF FIFTEENTH-CENTURY ENGLAND 207-13, 219-21 (1998); Ann S. Haskell, *The Paston Women on Marriage in Fifteenth-Century England*, 4 VIATOR 459, 467-71 (1973).

170. *See* Haskell, *supra* note 169, at 467; *see also* GIES, *supra* note 169, at 219-21 (demonstrating both the bishop's sympathies for the Paston family and his adherence to the canon-law rule on freedom of consent).

171. Haskell, *supra* note 169, at 468.

172. *See* X 4.1.29.

Furthermore, the surviving records of church courts provide evidence that compelled consent was no consent.[173]

At the end of the sixteenth century, the Jesuit canonist Tomás Sánchez authored *De sancto matrimonii sacramento*, (On the Sacrament of Holy Matrimony),[174] what would prove to be "a standard Roman Catholic guide to marriage problems until the mid-twentieth century."[175] "A lawyer, who was [s]ometimes . . . betrayed by lawyer's vices of which he was not free—a fondness for distinctions, a formalism which attempted to win substantive points by the rearrangement of abstract concepts,"[176] Sánchez was also "a grave and just and subtle spirit,"[177] who mastered the entire medieval tradition of matrimonial law and theology "with the suppleness and firmness of a supreme craftsman or a true artist."[178]

Sánchez analyzed the question of force and fear as it pertained to women as part of his larger treatment of reverential fear. Reverential fear, that natural respect and awe that a subject feels towards a superior, such as a son toward his father or a wife toward her husband,[179] was insufficient, by itself, to invalidate a marriage.[180] Only when accompanied by outward actions, such as threats or beatings, which have the effect of inducing fear in a constant man, might reverential fear be considered as an invalidating factor.[181] To this point, there was very little to suggest that Sánchez would depart from an already well-worn path.

However, Sánchez understood, as Hostiensis had before him, that different levels of fear might operate differently on persons

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173. *See* BRUNDAGE, *supra* note 142, at 454; HELMHOLZ, *supra* note 9, at 220-28; FREDERIK PEDERSEN, MARRIAGE DISPUTES IN MEDIEVAL ENGLAND 121-28 (2000).

174. *See* THOMAS SÁNCHEZ, DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUM (1637).

175. BRUNDAGE, *supra* note 142, at 564.

176. JOHN T. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA 31 (1972).

177. *Id.*

178. *Id.* at 31-32.

179. *See* SÁNCHEZ, *supra* note 174, at Lib. 4, *De consensu coacto*, disp.6, no.4 *summarium* ("metus reverentiae quo inferior reverentia superioris, uxor viri, filius patris, etc . . . .").

180. *See id.*

181. *See id.* at no.7 ("Ultima sententia (quam multo veriorem reputo) docet, solum metum reverentialem, nisi minae, aut verbera, aut alius metus gravis illis adjungatur, non cadere in virum constantem . . . .").

depending on their condition. A son of adult age might respond differently to threats than a daughter who is a mere girl, or a son who is underage.[182] What of a daughter who is subjected to her father's wrath (*indignatio*)? Is mere fear of a father's wrath sufficient to invalidate?

Sánchez commenced his answer conventionally enough: "If a daughter contracts marriage without precedent threats, but only because of the fear she might incur her father's wrath, it is valid, since this fear is not accounted as moving a steady man."[183] However, Sánchez made a distinction: If it is likely that the father's wrath will not long endure, and there is hope of reconciliation, this is one thing; but where it is probable that a father's or a husband's wrath will endure a long time, or forever, in such circumstances, Sánchez believed the fear would be sufficient to invalidate.[184] One sees in Sánchez's answer both his "fondness for distinctions" and his keen awareness of the complexity of human emotions and their impact on free consent.[185]

In this way, an analysis of force and fear sensitive to the individual person, both male and female, and to particular circumstance, was carried forward into the sixteenth century. The right of women under the law to consent freely to marriage was thus preserved in a way that was sensitive to the ways in which family authority might be asserted in the early modern era. And, through Sánchez, modern canon law came to inherit a developed theory of force and fear and its potential impact on matrimonial consent.

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182. *See id.* at no.8 ("Unus tamen . . . hanc sent. limitat, dicens ad matrimonium irritandum non sat esse metum reverentialem patris cum minis nisi simul adsint verbera, in filio masculo adultae aetatis, secus in filia puella, & filio impubere . . . .").

183. *Id.* no.14 ("Infertur si filia matri. contrahat non praecedentibus minis, solum eo timore, ne patris indignatio incurrat esse validum: non enim is metus censetur cadens in virum constantem.").

184. *See id.* ("Hoc tamen moderarer, ut intelligatur, quando indigantio illa patris vel viri non diù permanebit, sed spes est futurae reconciliationis: si enim teneret probabiliter diuturnam fore indignationem & semper se habiturum patrem, aut virum valdè infestum, & indignatum, objecturumque passim illam inobedientiam, crediderim esse timorem cadentem in virum constantem.").

185. NOONAN, *supra* note 176, at 31.

IV. THE CONJUGAL RIGHT

Women not only shared equally in the right to choose a marriage partner, they also shared equally in the right to demand satisfaction of the conjugal debt. The notion of a conjugal debt has its origins in St. Paul's First Letter to the Corinthians:

> Let the husband render to the wife her due, and likewise the wife to the husband. The wife has not authority over her body, but the husband; the husband likewise has not authority over his body, but the wife. Do not deprive each other, except . . . by consent, for a time, that you may give yourselves to prayer; and return together again lest Satan tempt you because you lack self-control. But this I say by way of concession, not by way of commandment.[186]

"The term that is translated above as 'due' is the Greek word *opheile*. *Opheile* unambiguously meant what was owing. It was a debt. In the *Vulgate*, Jerome translated *opheile* as *debitum*. The notion of what was owing or due was preserved by this translation."[187]

The patristic authors subsequently made the conjugal debt a part of their theology. In the fifth century, Augustine developed a theology of marriage which saw the union of man and woman as embodying three great goods: procreation; life-long fidelity between the spouses; and the sacramental sign of Christ's union with the church.[188] Marriage's end, or ultimate purpose, was the advancement of love between the parties.[189] In this context, Augustine distinguished between two types of sexual intercourse within marriage: that undertaken for purposes of procreation, which was entirely blameless; and that undertaken by reason of the Pauline debt, which amounted to a pardonable wrong on the part of the one seeking sexual satisfaction.[190] As Augustine put it, those who have

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186. 1 *Corinthians* 7:3-6 (Saint Joseph New Catholic Edition).

187. Reid, *supra* note 18, at 81 (citing JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 42 (enlarged ed., 1986)).

188. *See* Glenn W. Olsen, *Progeny, Faithfulness, Sacred Bond: Marriage in the Age of Augustine*, *in* CHRISTIAN MARRIAGE: A HISTORICAL STUDY 101, 121 (Glenn W. Olsen ed., 2001).

189. *See id.* at 121-22.

190. *See* AUGUSTINE, DE BONO CONIUGALI, 7, 15 (P.G. Walsh ed. & trans., Clarendon Press 2001); Augustinus Hipponensis, *De bono coniugali*, *in* 41

intercourse "inflamed with passion are using their *ius* (right) intemperately," but may nevertheless be forgiven their excesses.[191]

While Augustine made use of rights language in describing the conjugal debt, the idea of the conjugal relation as a right assertable by the parties to a marriage was by no means a prominent part of his thought.[192] Twelfth and thirteenth-century writers would, however, juridicize the marital relation as understood by Augustine, and thereby transform it into a set of mutually entailing rights assertable by both parties to a marriage.[193] This transformation commenced with Gratian's treatment of the subject. Gratian grounded his treatment of the conjugal debt on the standard medieval suspicion of unrestrained sexuality.[194] Before the Fall from the Garden of Eden, Gratian noted, the marriage bed was "immaculate," but expulsion from Paradise brought with it sexual urges, necessary for reproduction, but also capable of abuse.[195] Marriage was the proper outlet for these impulses. Following Augustine, Gratian noted that marital intercourse for procreative purposes was blameless, while marital intercourse for the satisfying of lust was a pardonable transgression.[196]

Recognizing that St. Paul had counseled couples that they might separate for a time in order to give themselves to prayer, Gratian tested the limits of the Apostle's advice. Might a man permit his wife to take a vow of continence and enter religious life? Might a man take such a vow himself even though married?[197] Summarizing his sources, Gratian concluded that either spouse may renounce the debt, provided the other spouse freely consented.[198] In such circumstances, although the marriage bond endured, the sexual rights

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CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM, 1.14.15 (1900) [hereinafter Augustine, *De bono coniugali*]; Augustinus Hipponensis, *De nuptiis et concupiscentia*, *in* 42 CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM, 5.5, 6.6, 7 (1902).

191. *See* Augustine, *De bono coniugali*, *supra* note 190, at 194 ("[A]rdore concupiscentiae ipso suo iure intemperanter utentes . . . .").

192. *See* Reid, *supra* note 18, at 81 n.202.

193. *See id.* at 81.

194. *See* Elizabeth M. Makowski, *The Conjugal Debt and Medieval Canon Law*, 3 J. MEDIEVAL HIST. 99, 100-10 (1977).

195. *See* C.32 q.2 d.p.c.2.

196. *See id.*

197. *See* C.33 q.5 cc.10-11.

198. *See* C.33 q.5 d.p.c.11.

thereby created ceased to be operative. And so, Gratian continued, one who has absolved the other party from his or her right (*a suo iure*) may not thereafter summon one's spouse back to this obligation.[199]

Canonists and theologians built on this foundation an impressive structure of mutually entailing rights and obligations. The structure of rights that was brought into being had its limitations. Because the canonists conceptualized rights as claims which parties might freely assert, they encountered a particular problem when they addressed the problem of the reluctant bride—a woman who consented to marriage but subsequently refused to consummate the union. This problem led some writers to advocate extreme solutions demonstrating that a formal equality of rights could lead to some highly unequal results. But the canonists' reliance on rights language also had its advantages. The conjugal right could serve as a check on the exercise of arbitrary power and could even—as in the case of the spouse who contracted leprosy—require truly heroic conduct for the benefit of the ill spouse.[200]

The problem of the right to consummation arose because of the triumph of the consent theory of marriage. Consent, not consummation, made a marriage,[201] and sexual relations, although conferring a special indissoluble firmness to a marriage, were not essential to the union's legal survival.[202] After all, even though Joseph and Mary were legally married and the very paradigm of holy matrimony, they never consummated their union.[203] But because

199. *See id.*

200. *See infra* notes 255-61 and accompanying text.

201. *See supra* notes 142-48 and accompanying text; *see also infra* notes 212-14 and accompanying text (documenting further the triumph of the consent theory of marital formation). "Efficiens autem causa matrimonii est consensus, non quilibet, sed per verba expressus, nec de futuro sed de praesenti." ["The efficient cause of marriage is consent, not any [consent], but that expressed through words not of future, but of present tense."] PETER LOMBARD, LIBRI IV SENTENTIARUM Lib. 4, dist.27, cc.3-4 (1916).

202. *See* James A. Brundage, *Implied Consent to Intercourse*, *in* CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES 245, 246-48 (Angeliki E. Laiou ed., 1993).

203. *See generally* Penny S. Gold, *The Marriage of Mary and Joseph in the Twelfth-Century Ideology of Marriage*, *in* SEXUAL PRACTICES & THE MEDIEVAL CHURCH 102 (Vern L. Bullough & James A. Brundage eds., 1982) (discussing the virginal and marital ideal Joseph and Mary represented in the Middle Ages). The decretist Rolandus argued that even though Joseph and

consummation did confer a special strength on marriage, and because procreation was one of the fundamental goods of marriage, the sexual relationship could not be ignored. Thus, the question: By what right did parties consummate their unions? Furthermore, might a marriage be forcibly consummated, where a spouse resisted?

Rolandus, a mid-twelfth-century decretist,[204] saw marriage as consisting of two *fides* (faiths) which came into being by different acts. The *fides* of the matrimonial contract arose from the exchange of consent between the parties, while the *fides* of carnal joining brought about a "mutual servitude" for the purpose of discharging the debt.[205] Left unspoken by Rolandus was whether the husband had a right to consummate the marriage and whether his bride had the right to resist.

Huguccio addressed this question more directly, taking issue squarely with Rolandus. It has been argued, Huguccio began, that the right of demanding the conjugal debt (*ius exigendi debitum*) arose only after the first act of intercourse.[206] Distinguishing between a right and a right's execution, Huguccio maintained that the right to demand the conjugal debt was a part of marriage itself, arising from the exchange of promises between the parties, but its execution only occurred after the bride was handed over or the nuptial blessing conferred.[207] Huguccio explained what he meant by execution when

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Mary refrained from all sexual intercourse, they nevertheless satisfied all three goods of marriage: fidelity, children, and sacramental unity. *See* SUMMA MAGISTRI ROLANDI C.27 q.2 c.10 (Friedrich Thaner ed., 1962).

204. *See generally* John T. Noonan, Jr., *Who Was Rolandus?*, *in* LAW, CHURCH, AND SOCIETY: ESSAYS IN HONOR OF STEPHAN KUTTNER 21 (Kenneth Pennington & Robert Somerville eds., 1977) (critically examining the evidence of Rolandus's biography).

205. *See* SUMMA MAGISTRI ROLANDI, *supra* note 203, at C.27 q.2 cc.6, 27; *see also* JAMES A. CORIDEN, THE INDISSOLUBILITY ADDED TO CHRISTIAN MARRIAGE BY CONSUMMATION 7-9 (1961) (reviewing Rolandus' contributions).

206. *See* Huguccio, *Summa d'Huguccio sur le décret de Gratien*, 27 NOUVELLE REVUE HISTORIQUE DE DROIT FRANCAIS ET ÉTRANGER 745, 756 (1903).

207. *See id.* ("Mihi videtur quod jus exigendi est ipsum conjugium, vel oritur ex eo, et statim competit ex quo est conjugium, sed non statim competit illius juris executio, id est, actus exequendi illud jus . . . . Potest dici quod a tempore traductionis vel traditionis vel benedictionis sacerdotalis."). *Traductio* or *traditio* referred to the act of handing the bride over at the time of the marriage itself. *See* BRUNDAGE, *supra* note 142, at 262; CORIDEN, *supra* note 205, at 3.

he compared the right to demand the conjugal debt to the powers of a priest under interdict to hear confession or the right of a creditor to demand payment of a debt on a certain date.[208] In both instances, a right has been vested in the party by reason of a certain past event, such as priestly ordination or the exchange of promises that created the debt.[209] But the authoritative power to exercise the right can only be conferred by a subsequent occurrence—that is, the lifting of the interdict, or the arrival of the date on which the debt has come due.[210]

Bernard of Pavia, who wrote a treatise on marriage law at the dawn of the thirteenth century, contrasted these two schools of thought on the origin of the conjugal debt.[211] Some have argued that the debt arises with the first act of sexual intercourse, but the problem with this school of thought, according to Bernard, is that if the parties fail to consummate the marriage, the right never comes into existence.[212] Others have claimed that the right arises from the exchange of promises, but that the right is not immediately activated, but must await the handing over of the bride.[213] It is this latter school of thought which had more appeal for Bernard. Either the handing over of the bride, or better, the nuptial blessing, should be seen as effectuating a completed marriage after which the parties could equally claim the conjugal debt and were no longer free to leave the marriage or pursue a religious vocation.[214]

Both Huguccio and Bernard, however, avoided the very real problem that was presented by a wife who was genuinely unwilling to go through with the consummation. The author of the anonymous *Summa induent sancti*, however, was not so reticent.[215] The author

208. *See* Huguccio *supra* note 206.
209. *See id.*
210. *See id.*
211. *See* BERNARD OF PAVIA, *Summa de matrimonio*, *in* SUMMA DECRETALIUM app. at 287-306 (E.A.T. Laspeyres ed., 1956) [hereinafter BERNARD, *Summa de matrimonio*]; *see also* BRUNDAGE, *supra* note 9, at 210-11 (commenting on Bernard's career).
212. *See* BERNARD, *Summa de matrimonio*, *supra* note 211, at 299.
213. *See id.*
214. *See id.*
215. Regarding the publication of this *Summa*, we are told: "The *summa* is a product of the French school and dates from about 1192-1195." SUMMA INDUENT SANCTI: A CRITICAL EDITION OF A TWELFTH-CENTURY CANONICAL TREATISE 2 (Richard Michael Fraher ed., 1978) [hereinafter SUMMA INDUENT SANCTI].

began conventionally enough by proposing that prior to consummation either party was free to enter religious life without the other's consent.[216] Indeed, Pope Alexander III, in the decretal *Ex publico*, had allowed a bride who gave present-tense consent, but who had not consummated her marriage, of two months to decide whether to choose religious life.[217]

But, the author continued, suppose that her husband has chosen to consummate the marriage "violently" (*violenter*), before she has entered a monastery?[218] He has used his right (*Ille enim usus iure suo*).[219] He has brought force to bear without deceit; indeed, the force he has used can be called just and is comparable in its justness to the force used by the magistrate.[220] Citing to a second decretal of Alexander, the author conceded that a woman may enter the convent prior to a marriage's consummation without her husband's consent, but only so long as there has been no sexual intercourse.[221] But here there has been sexual intercourse. The husband has had carnal relations with his espoused in virtue of his right, even though his partner has resisted.[222] Furthermore, the author added, it is a mortal sin for the woman to refuse her husband in these circumstances, unless she is prepared to enter the monastery at once.[223]

It seems that subsequent canonists were unwilling to press the logic of the right of demanding the conjugal debt as far as did the author of the *Summa induent sancti*. Nevertheless, it remained the case that a party might be compelled to consummate a marriage. Hostiensis made this point in his commentary on *Ex publico*.[224] Hostiensis first observed that some have argued that the first act of intercourse should be considered "free" (*gratuita*) since prior to consummation either party is free to enter religious life and neither

216. *See id.* at 605; C.27 q.2 c.6.
217. *See* X 3.32.7 (providing the text of *Ex publico*).
218. *See* SUMMA INDUENT SANCTI, *supra* note 215, at 604.
219. *See id.*
220. *See id.* ("[E]t vis ista sine dolo fuit, et vis iusta dici potest, sicut vis a magistratu . . . .").
221. *See id.* at 605.
222. *See id.* ("Interim tamen nihilominus potest vir eam cognoscere suo iure, etiam ea repugnante.").
223. *See id.* ("Petenti autem illa negare sine mortali peccato non potest nisi parata sit statim monasterium intrare . . . .").
224. *See* HOSTIENSIS, *supra* note 29, at X 3.32.7 v. *vel ad virum*.

has power over the other.[225] Hostiensis rebutted this proposition. He asserted that "the contrary is true," following this terse claim with cross-references to three decretals that stood for the proposition that it was the church's prerogative to enforce marriage contracts made in the present tense.[226] Absent from Hostiensis's analysis is any sense of the rough justice and self-help of the *Summa induent sancti*. But his analysis still allowed the official weight of the church to be brought to bear on the spouse who refused to consummate a marriage and also refused to enter religious life.

It would be Thomas Aquinas who would return to the issue of self-help presented so baldly by the *Summa induent sancti*, asking whether the action countenanced in that text amounted to a species of rape.[227] Rape, as Thomas defined the term, was committed whenever violence was used illicitly to deflower a virgin.[228] What, then, of a man betrothed to a girl? Does he commit the crime of rape by forcibly consummating the union? Thomas answered in the negative: He has a kind of right in the betrothed (*aliquod jus in sua sponsa*).[229] Hence, although he commits a sin by bringing violence to bear against his betrothed, he is excused from the crime of rape.[230] Thomas did succeed in turning the tables on the author of the *Summa*. No longer would the woman sin by resisting her attacker. It was the attacker who sinned and put his immortal soul in jeopardy by his violent sexual coercion. But the woman's ultimate remedy was not in the criminal courts of the external forum, but before the throne of God.

But if the notion of a right to the conjugal debt could disadvantage the female party to a marriage prior to consummation, this right might also be of advantage in other situations. In a

225. *See id.*

226. *Id.* The decretals Hostiensis cites include: X 4.1.10, which permits a party to compel consummation by means of ecclesiastical censure; X 4.1.9, which stands for the proposition that present-tense consent makes a marriage; and X 4.1.22, which again recognizes the church's power to enforce a marriage contract by ecclesiastical censure. *See id.*

227. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 2a 2ae q.154 art.7 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947).

228. *See id.* at 2a 2ae q.154 art.7 resp. ("Dicendum quod raptus . . . . quando aliquis violentiam infert ad virginem illicite deflorandam.").

229. *See id.* at 2a 2ae q.154 art.7 resp.4.

230. *See id.* ("[E]t ideo quamvis peccet violentiam inferendo, excusatur tamen a crimine raptus.").

consummated marriage, the right to the conjugal debt was one of the very few areas of equality between a husband and wife.[231] Theologians and canonists were agreed on this point. Thus the theologian Peter Lombard wrote: "It should also be known that although in all other respects the man is placed above the woman, at her head, for 'the man is the head of the woman,' nevertheless in satisfying the debt of the flesh they are equal."[232] Gandulf of Bologna echoed this observation when he asked directly whether man and wife were equal with respect to the conjugal debt and answered in the affirmative.[233] Citing to St. Paul and St. Ambrose, Gandulf concluded that spouses are equal in demanding the conjugal debt, even though he acknowledged that "in other matters the husband is superior."[234]

The canonists agreed with the sentiments of the theologians. Echoing St. Paul, Hostiensis noted simply that such is the effect of a consummated marriage, that a woman has no power over her body, but her husband, and also the reverse.[235] While in other respects, the husband is to be obeyed, neither party may take an action, such as changing one's status in life, or entering religious life, which has the effect of damaging the other party's claim to the conjugal debt without the other's consent.[236] The conjugal debt, furthermore, was permanent: a valid marriage gave rise to a sacramental bond which is dissolvable only by death, and by no other occurrence, "such as

231. *See generally* James A. Brundage, *Sexual Equality in Medieval Canon Law*, *in* MEDIEVAL WOMEN AND THE SOURCES OF MEDIEVAL HISTORY 66 (Joel T. Rosenthal ed., 1990) (discussing the evolution of medieval canonists' opinions about the sexual equality of married men and women).

232. LOMBARD, *supra* note 201, at Lib. 4, dist.332 ("Sciendum est etiam, quia, cum in omnibus aliis vir praesit mulieri, ut caput corpori, est enim 'vir caput mulieris,' in solvendo tamen carnis debito pares sunt.") (quoting 1 *Corinthians* 11:3).

233. *See* GANDULF OF BOLOGNA, SENTENTIARUM LIBRI QUATUOR, Lib. 4 § 227 (Joannes de Walter ed., 1924).

234. *See id.* ("Sunt autem pares in carnali debito reddendo coniugati . . . 'In aliis vero praeest vir.'").

235. *See* HOSTIENSIS, *supra* note 146, at Lib. 4 *De matrimonio* § 21 ("Et etiam est tantus effectus matrimonii consummati quod mulier non habet potestatem sui corporis, sed vir, et econtra.").

236. *See id.* ("Unde nec alter altero invito potest vitam mutare nec ad religionem convolare.").

one party becoming a heretic, or becoming blind or leprous, or encountering some other horrible thing."[237]

This concern for the equality and permanence of the conjugal debt would come to color much of thirteenth-century analysis of marital relations. The protection and preservation of the equality of the relationship established by the conjugal right—*ius coniugale*—and the set of reciprocal claims and obligations thereby generated, would become a principal foundation of canonistic analysis of the entire marital relationship.

The *ius coniugale* might serve as a restraint on arbitrary action, whether by public authority or by the other party to a marriage. The decretalists were particularly fond of considering the interaction of the feudal rights of lords with the marital rights of serfs.[238] What if a feudal lord demanded his serf's services at the same time the serf's wife demanded satisfaction of the conjugal *ius*? This was an especially intriguing question, because feudal lords had a right—*ius*—in their serfs, as did the serfs' wives.[239]

The decretalists gave conflicting answers to this question. Bernard of Parma, balancing the interests of serfs and their feudal overlords, was willing to give priority to the claims of the serf's wife.[240] The serf-husband called upon by his lord, Bernard argued, should ordinarily first be allowed to satisfy his wife, since the lord would be only minimally inconvenienced by such a delay.[241] Innocent IV, on the other hand, sided with the lord, citing to Roman law for the proposition that the lord's demands should be given

237. *Id.* at § 20 ("Item effectus est ut ex quo tenuit inter fideles semel contractum matrimonium nullatneus dissolvatur, nisi per mortem que omnia solvit . . . etiam si alter coniugum efficiatur hereticus, vel cecus vel leprosus, vel aliquid aliud horrendum incurrat quantumque sit.").

238. *See* Reid, *supra* note 18, at 88-91.

239. *See* HOSTIENSIS, *supra* note 29, at X 4.9.1 v. *sacramentis*. The balance between the rights of the serf and the serf's family, on the one hand, and the rights of the feudal lord, on the other, was a recurrent one in both decretist and decretalist commentary. *See* Peter Landau, *Hadrians IV. Dekretale "Dignum Est" (X 4.9.1.) Und Die Eheschliessung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts* [Hadrian IV's Decretal "Dignum Est" (X 4.9.1.) and the Marital Formation of the Unfree in the Writings of the Canonists and Theologians of the Twelfth and Thirteenth Centuries], 12 STUDIA GRATIANA 511, 535-46 (1967).

240. *See* BERNARD OF PARMA, *supra* note 105, at X 4.9.1 v. *servitia*.

241. *Id.*; *see also* Reid, *supra* note 18, at 89 (analyzing Bernard of Parma's argument).

priority, unless delay raised the danger of the wife committing adultery.[242]

Hostiensis subsequently rejected Innocent's arguments. There are some, Hostiensis observed, who argue the feudal obligation is prior in time and should be given priority over the marital rights of a serf's wife.[243] But, Hostiensis continued, where there is danger of fornication it is clear that God's law and the teaching of St. Paul should be given priority.[244]

Raymond of Peñafort provided the most detailed response to this dilemma. Where the lord has consented to a servile marriage, Raymond argued, he should be presumed to have consented to the conjugal rights that are a part of marriage.[245] But where the marriage took place against the lord's wishes, or without his knowledge, the lord's orders should ordinarily receive priority.[246]

The particulars of this analysis are not as significant as the decretalists' effort to reach a compromise between two conflicting sets of rights: those of a feudal lord to his customary services, and those of a wife expecting her husband to act in conformity to the teaching of St. Paul's letter.

One sees this sort of analysis repeated in the area of the renunciation of the marital right. Neither husband nor wife was free to separate from his or her spouse, or to renounce the conjugal right without permission of the other.[247] Two decretals of Pope Innocent III's, *Veniens* and *Accedens*, established that renunciations of the marital right could not be the result of force, fear, or fraud.[248] In both of these decretals, husbands engaged in extreme acts and threats—in *Veniens*, the husband threatened that he would castrate himself, while in *Accedens*, the husband beat his wife and threatened her with physical harm—in order to obtain the permission of their spouses to enter religious life.[249] When the two men encountered difficulty with their new vocations, it was determined that they had effectively renounced their marital rights but that their spouses, so

242. *See* INNOCENT IV, *supra* note 108, at X 4.9.1 v. *servitia.*
243. *See* HOSTIENSIS, *supra* note 29, at X 4.1.9 v. *exhiberi.*
244. *See id.*
245. *See* RAYMOND OF PEÑAFORT, *supra* note 111, at 928.
246. *See id.*
247. *See* Reid, *supra* note 18, at 83-85.
248. *See* X 3.32.16 (*Veniens*); X 3.32.9 (*Accedens*).
249. *See id.*

long as their conduct had been blameless, might be restored to their rights.[250] One might freely renounce one's own right, the decretalists reasoned, but one could not be deprived of one's right without fault (*sine culpa*).[251]

The limits of the decretalists' solicitude for the protection of the rights of innocent third parties was tested by the case of a spouse who contracted leprosy. Leprosy was a dreaded and fearful disease in thirteenth-century Europe, chiefly affecting rural areas and extending north into Scandinavia.[252] Without hope of cure, lepers were to be segregated from the larger society, sometimes living in isolated encampments, sometimes housed in leprosariums that came to be established in the larger dioceses of western Europe during the twelfth and thirteenth centuries.[253] A comprehensive set of rules grew up to effectuate this separation.[254]

Marriage represented a conceptual problem for this policy of isolation. Spouses, after all, pledged themselves to a lifelong community of life with one another, and they were not to lose their

250. *See id.* The wife in *Veniens* was denied restoration of her rights because she had taken a number of lovers (*amatores*) during her husband's absence, but the wife in *Accedens* was restored to her full marital rights because of her blameless conduct. *See id.*; *see also* Reid, *supra* note 18, at 83-85 (recognizing decretalists basic principle that "no one was to lose his or her rights through no fault of her own.").

251. *See* Reid, *supra* note 18, at 83-85.

252. *See* PETER RICHARDS, THE MEDIEVAL LEPER AND HIS NORTHERN HEIRS 3-12 (1977); *see also* Ann G. Carmichael, *Leprosy*, *in* THE CAMBRIDGE WORLD HISTORY OF HUMAN DISEASE 834, 834 (Kenneth F. Kiple ed., 1993) (stating that leprosy likely extended as far north as the Arctic Circle).

253. *See* FRANÇOIS-OLIVIER TOUATI, MALADIE ET SOCIÉTÉ AU MOYEN ÂGE: LA LÈPRE, LES LÉPREUX, ET LES LÉPROSARIES DANS LA PROVINCE ECCLÉSIASTICQUE DE SENS JUSQU'AU MILIEU DU XIV SIÈCLE [DISEASE AND SOCIETY IN THE MIDDLE AGES: LEPROSY, LEPERS, AND LEPRORIUMS IN THE ECCLESIASTICAL PROVINCE OF SENS AROUND THE MIDDLE OF THE FOURTEENTH CENTURY] 247-307 (1998). Isolation of lepers has remained part of public health policy even in modern America. *See* Peter Applebome, *Leprosy Patients Recall a Pain Beyond Disease*, N.Y. TIMES, Mar. 27, 1989, at A14; Rick Bragg, *Lives Stolen by Treatment, Not by Disease: The Last Lepers*, N.Y. TIMES, June 19, 1995, at A1; Sandeep Jauhar, *Both Home and Prison, Leprosy Site May Shut*, N.Y. TIMES, June 23, 1998, at F4.

254. *See generally* E. JEANSELME, COMMENT L'EUROPE AU MOYEN AGE: SE PROTÉGEA CONTRE LA LÈPRE [HOW EUROPE PROTECTED ITSELF AGAINST LEPROSY IN THE MIDDLE AGES] (1931) (examining the development of rules governing the segregation of lepers from Western society).

marital rights through no fault of their own.[255] Two decretals of Pope Alexander III commanded healthy spouses to remain with their ill companions, and to minister to them with "marital affection."[256] The decretalists considered the extent to which the healthy partner was to render to the ill spouse the conjugal right. Bernard of Parma argued that the healthy spouse need not share the same living arrangements as the ill spouse and that the ill spouse should not be "overly wicked" in demanding the conjugal right.[257] But where the ill spouse demanded satisfaction of the debt, it could not be denied, since this would be to defraud the ill spouse of his or her right without fault.[258]

Innocent IV, for his part, distanced himself from those who rigidly required fulfillment of the conjugal debt: others say that the parties are to be strictly compelled to render the debt, Innocent noted, but, he maintained, out of kindness (*de benignitate*), something else might be tolerated.[259]

Hostiensis, finally, staked out a position that recognized at once the sanctity of the right at stake but that also tempered rigidity with a sense of compassion for the difficult situation created by a diagnosis of leprosy. Marriage, Hostiensis began, was instituted by God to make two persons into one flesh, and Scripture permitted separation only in cases of adultery.[260] Hostiensis noted that by the terms of Pope Alexander's decretals, the healthy spouse was obliged to render the conjugal debt when it was demanded.[261] He acknowledged that while it would be a mortal sin to refuse to render the debt when it was demanded, he also declined to apply the ecclesiastical penalty of excommunication to such cases: the healthy party might simply find the level of revulsion too great to render the debt, and he or she should not be obliged to do the impossible.[262]

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255. *See* Reid, *supra* note 18, at 86-88.

256. *See* X 4.8.1; X 4.8.2; *see also* John T. Noonan, Jr., *Marital Affection in the Canonists*, 12 STUDIA GRATIANA 481, 489-509 (1967) (commenting on the importance of marital affection to canonistic thought on marriage); Reid, *supra* note 18, at 86-87 (analyzing these decretals).

257. *See* BERNARD OF PARMA, *supra* note 105, at X 4.8.1 v. *ministrent.*

258. *See id.*

259. *See* INNOCENT IV, *supra* note 108, at X 4.8.1 v. *potuerunt.*

260. *See* HOSTIENSIS, *supra* note 29, at X 4.8.1 v. *una caro.*

261. *See id.* at X 4.8.1 v. *ministrent.*

262. *See id.*

This analysis illustrates the powerful hold claims of right have on the legal imagination. The violence of a forcible consummation was nearly completely masked by the invocation of rights language in a work like the *Summa induent sancti*.[263] Even Thomas Aquinas, who was willing to analyze forcible marital intercourse under the rubric of rape and to condemn transgressors as sinners, concluded that a husband's forcible intercourse with his newly wed bride did not amount to the crime of rape, because he had some right to take this action.[264]

On the other hand, claims of right could insulate married women, as well as men, from the worst depredations of feudal life. The marital rights of female serfs were to be protected. Women and men were to be safeguarded from arbitrary renunciations of marital rights. And in an extreme case, a spouse with leprosy was to be protected in her or his marital right. The marital right was not to cease even with the onset of the most feared disease of the age.[265]

V. CONCLUSION

The *ius mulierum*, as Hostiensis pointedly observed, was in most circumstances of lesser condition than the right of men. Yet Hostiensis conceded there were areas where this right might be equal to or even stronger than male rights. This Article has explored three areas where an equality of rights prevailed between men and women—the right to select one's place of burial, the right to contract marriage freely, and the right to exact the conjugal debt. In fact, the popes, canonists, and theologians of the twelfth and thirteenth centuries were greatly innovative in recognizing these areas of equality. As was seen in the case of women's burial rights, a powerful tradition sometimes had to be repudiated before equality of choice could come into being. And as evidenced by Margery Paston, once these spheres of freedom were brought into being, women, as well as men, were free to exercise their power of choice.

The use of rights language to define these three areas of personal choice at times gave rise to a formal equality that was betrayed by the reality of human interaction. This is most clearly seen in the case

263. *See* ST. THOMAS AQUINAS, *supra* note 227, at 2a 2ae q.154 art.7 resp.4.
264. *See supra* notes 227-30 (reviewing Thomas's arguments).
265. *See supra* notes 238-62 (reviewing the conjugal right in the context of feudal relations and leprosy).

of the right to consummate a marriage. Theoretically, it would seem that men, as well as women enjoyed this right, but in practice, as even the canonists and theologians acknowledged, it was a right claimable by men alone. Even Thomas Aquinas, who analyzed forcible consummation under the rubric of rape, could not bring himself to see this action as a crime, even though it amounted to a sinful use of one's right.

At other times, however, reliance on rights language served to protect the interests of the vulnerable party in the marital relationship. Thus, the canonists expended considerable efforts in protecting the rights of women in feudal marriages, and the rights of the ill spouse, where one or the other party had contracted leprosy. Marriage created a sacred bond which gave rise to certain rights which no human authority could arbitrarily violate.

From a distance of seven hundred years, these debates remain valuable for the patterns of thought they laid down. In narrowly drawn circumstances, the relationship of men and women might be analyzed by recourse to their rights. While wives remained generally subject to their husbands throughout the middle ages, certain areas of equality were carved out, which the law stood ready to enforce. The principles thereby articulated, however, were capable of expansion and generalization, and persist to our own day.